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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER, PLAINTIFF, AND PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION, INTERVENOR,
Plaintiffs in Error,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,
Defendants in Error

Leave is hereby granted to file this 24 day of August, 1950. Denver N. Davison, Chief Justice.

STATEMENT OF BASIS OF APPELLATE JURISDICTION

The following is a statement of the basis on which Appellant contends the Supreme Court of the United States has jurisdiction to review on appeal the judgment appealed from, as required by Supreme Court Rule 12.

Pursuant to Supreme Court Rule 12, Paragraph 1, Public Service Company of Oklahoma, a corporation, the above named Appellant, files this its statement particularly disclosing the basis on which it contends that the Supreme

Court of the United States has appellate jurisdiction to review on appeal the judgment of the Supreme Court of the State of Oklahoma appealed from, as follows:

1

The statute believed to sustain appellate jurisdiction is 28 U. S. Code, Section 1257, Subdivision 2, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2

The judgment appealed from was entered May 23, 1950, as appears from the decision of the Supreme Court of the State of Oklahoma appearing at unnumbered Pages 180 to 194 of the typewritten transcript being prepared for this appeal and became final July 18, 1950, upon the order denying the petition for rehearing as shown by such order appearing at unnumbered Pages 198 to *198* of the typewritten transcript being prepared for this appeal.

3

The petition for an order allowing an appeal was presented to the Honorable Denver N. Davison, Chief Justice of the Supreme Court of Oklahoma August 1, 1950, and such petition was denied on that date and was thereafter presented to a Justice of the Supreme Court of the United States and was allowed on August 24, 1950, as shown by such order appearing at unnumbered Pages 210 to 213 of the typewritten transcript being prepared for this appeal.

The appeal herein is from a decision of the Supreme Court of the State of Oklahoma affirming a judgment of the District Court of Tulsa County, Oklahoma, in a civil action involving both legal and equitable issues relating to the validity of bonds sought to be issued by the Town of Skiatook, Oklahoma. Such bonds are attacked by appellant, as authorized by Oklahoma Statutes, and are alleged by appellant to be invalid because of defects in the existence of the municipality because of which such bonds cannot affect property in Osage County, Oklahoma (The Osage Indian Reservation) illegally included in the Town of Skiatook, Oklahoma. It was the contention of the appellant that the act of the Town of Skiatook, incorporated prior to statehood contiguous to but wholly outside of the Osage Indian Reservation, annexing after statehood property wholly inside Osage County, Oklahoma (Osage Indian Reservation) whether or not authorized by statute, was in violation of and repugnant to the Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21. The judgment of the trial court and the decision of the Supreme Court of the State of Oklahoma hold that the Town of Skiatook, Oklahoma, by virtue of 11 O. S. 41, Sections 482 and 1042 had authority to annex territory lying in Osage County (Osage Indian Reservation) despite the Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21, although the Town of Skiatook had up to that time existed wholly outside Osage County, Oklahoma (Osage Indian Reservation). The judgment of the trial court and the decision of the Supreme Court of Oklahoma appear respectively at unnumbered Pages 52-54, and 131 to 133 and 180 to 194 of the typewritten transcript being prepared for this appeal.

There is one general question presented by this appeal. Whether a town in Oklahoma, incorporated prior to statehood adjacent to but wholly outside the Osage Indian Reservation, may now annex territory wholly in Osage County, Oklahoma (Osage Indian Reservation) by virtue of certain Oklahoma statutes which we contend are repugnant to the Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21. It is appellant's contention that the act of the Town of Skiatook, Oklahoma, existing wholly in Tulsa County, Oklahoma, annexing territory wholly in Osage County, Oklahoma (Osage Indian Reservation) effected a change in Osage County, Oklahoma, prior to the change of that county by the Legislature of Oklahoma, as required in The Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21, and that the annexations herein complained of were done under the authority of general laws of Oklahoma not applicable to Osage County (Osage Indian Reservation) as contemplated by The Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21, and that the effect of the decision appealed from is to give force and effect to those general statutes of the State of Oklahoma despite the provisions of The Act of Congress June 16, 1906, 34 U. S. Stats. at Large, Pages 267-278, Section 21. The validity, applicability and effect of the State statutes under this record are highly debatable, the issues are substantial, and are of a character that directly conflicts with the expressed will of Congress in a sphere where the power of Congress is supreme.

The cases believed to sustain the jurisdiction of the Supreme Court of the United States on this appeal are:

RFC v. *Beaver County, Pa.*, 328 U. S. 204;
First National Bank v. *Anderson*, 269 U. S. 341;
U. S. v. *Chavez*, 290 U. S. 360.

Respectfully submitted,

(S.) E. J. Doerner,
(S.) Theodore Rinehart,
(S.) Harry D. Moreland,
1510 National Bank of Tulsa Bldg.,
Tulsa, Okla.,
Attorneys for Appellant.

(S.) Jack E. Campbell,
(S.) Paul A. Walker, Jr.,
Of Counsel.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER, Plaintiff and PUBLIC SERVICE COMPANY OF OKLAHOMA, a Corporation, Intervenor, *Plaintiffs in Error,*

vs.

TOWN OF SKIATOOK, a Municipal Corporation, BOARD OF TRUSTEES OF THE TOWN OF SKIATOOK, EARL E. YERGAIN, J. MILTON PATRICK, RUSSELL G. JONES, WM. J. SUPERNAW, FRANK F. COCHRAN, and EXCHANGE BANK OF SKIATOOK, a Corporation, *Defendants in Error*

Filed in Supreme Court of Oklahoma, May 23, 1950, Andy Payne, Clerk.

SYLLABUS

1. The extension of its boundaries into Osage County by the Town of Skiatook, originally located entirely in Tulsa County, held not to be violative of the Enabling Act, or the Constitution of the State, and to be authorized by 11 O. S. 1941, sections 482 and 1042.

2. An ordinance annexing territory to a city or town is not void on its face merely because it fails to recite the existence of jurisdictional facts. The only effect of failure to recite jurisdictional facts is to enable an interested party, other than the state, to attack the validity of the ordinance, and show, if he can, that the jurisdictional facts did not exist.

3. Municipal bonds issued under authority of Article 10, section 27 of the Constitution, and following the procedure outlined in 11 O. S. 1941, sections 61-66, are not invalid because they do not conform to 11 O. S. 1941, sections 1007 and 1008.

4. The proposition submitted to the voters of the Town of Skiatook for the issuance of negotiable bonds to provide funds "for the purpose of purchasing an electric distri-

bution system and repairing and improving same, or constructing a new electric distribution system, if that be more expedient or desirable," held not void for indefiniteness or uncertainty.

5. Allegations in plaintiffs' petition to the effect that the town trustees in holding a bond election was actuated by some undisclosed or secret purpose, held properly stricken by the trial court.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Hon. Horace D. Ballaine, Judge

Action by A. W. Palmer, Boyd Hisaw, and Public Service Company of Oklahoma to enjoin the issuance and sale by the Town of Skiatook of bonds for the purpose of constructing an electric distribution system. The trial court refused to grant a permanent injunction, and dismissed the case. Plaintiffs appeal.

Affirmed

Doerner, Rinehart & Stuart, Harry D. Moreland, Jack E. Campbell, all of Tulsa, for Plaintiffs in Error.

R. L. Davidson, Jr., James G. Davidson, both of Tulsa, for Defendants in Error.

Luttrell, *J.*:

This action was brought by A. W. Palmer and Boyd Hisaw as plaintiffs, to enjoin the Town of Skiatook and its board of trustees from issuing and disposing of bonds in the amount of $49,600.00 for the purpose of acquiring or constructing an electric distribution system. The Public Service Company of Oklahoma, which was then serving the town with electricity, without a franchise, intervened in the action and joined with the plaintiffs in asserting the invalidity of the bonds. The trial court issued a temporary injunction when the petition was filed, but thereafter, upon a full hearing, set the temporary injunction aside, denied a permanent injunction, and dismissed the action at the cost of

plaintiffs and intervenor. Thereupon Boyd Hisaw withdrew as plaintiff, and the action proceeded in the name of A. W. Palmer, and Public Service Company of Oklahoma.

The petition of plaintiffs alleged several grounds in support of their contention that the issuance and sale of the bonds should be enjoined, and in this court in their briefs and orgal argument, they urge these contentions. or grounds, and assert that the trial court should have issued the permanent injunction as prayed for. We will dispose of these contentions in the order in which they appear in the brief of plaintiff in error.

The first contention made by plaintiffs is that the annexation of certain additions to the town of Skiatook, the residents of which were permitted to vote in the bond election, was invalid, and that therefore the voters residing in those precincts were not entitled to vote. Plaintiffs assert that the town of Skiatook was originally incorporated solely in Tulsa County, and that the annexation of these additions, which lay within Osage County, was forbidden by the Enabling Act and by Art. 17, section 8, of our Constitution, which provided that the boundaries of Osage County should remain unchanged until all the lands of the Osage Tribe of Indians should have been allotted, and until the same shall be changed as provided by the Legislature for changing county lines. We find nothing in the provisions of the Enabling Act nor of the Constitution to support the argument that the extension of the boundaries of the town of Skiatook into Osage County Changed the county line in any respect. Therefore there was no violation of the constitutional provisions or of the provision of the Enabling Act.

Plaintiffs also contend that no statutory authority exists authorizing a town to extend its boundaries into another county, although under our statutes towns may be incorporated in two or more counties, citing 43 C. J. p. 117, section 74. Examination of our statutes discloses that the Legislature in 11 O. S. 1941, section 1101 expressly authorized the incorporation of a town in two or more counties. By 11 O. S. 1941, section 482, and 11 O. S. 1941, section 1042, towns are given the authority to extend their boundaries under the conditions in these sections specified. In these sections

there is no restriction placed upon the right to take in additional territory because of the fact that it does not lie within the same county, and in addition it is expressly provided that a map or plat of the territory annexed shall be filed in the office of the register of deeds of the county "where the annexed territory or a greater portion of it is situated". We consider this sufficient statutory authority for the incorporation by a town into its territorial limits of any property which it was authorized to annex by the sections cited, regardless of the county in which such territory may be situated.

Plaintiffs further assert that an ordinance admitting one of said additions into the town is void because of its failure to recite the jurisdictional facts. This for the reason that the ordinance recites that the petition for annexation was signed by more than three-fourths of the residents, whereas 11 O. S. 1941, section 482 requires that it be signed by not less than three-fourths of the legal voters. In Missouri-Kansas-Texas R. Co. v. Maltsberger, 189 Okla. 363, 116 P. 2d 977, we said,

> "An ordinance annexing territory to a city or town is not void on its face merely because it fails to recite the existence of jurisdictional facts. The only effect of failure to recite jurisdictional facts is to enable an interested party, other than the state, to attack the validity of the ordinance, and show, if he can, that the jurisdictional facts did not exist."

In that case we pointed out that in Barton v. Stuckey, 121 Okla. 226, 248 P. 492, and City of Maud v. Tulsa Rig. Reel & Mfg. Co., 165 Okla. 181, 25 P. 2d 792, and similar cases, the ordinance affirmatively showed on its face an absence of jurisdictional facts. In the instant case the ordinance does not show that the residents signing the petition were not legal voters, and therefore the burden was upon plaintiffs to show such fact by evidence. This they wholly failed to do. The other additions were taken into the town by resolution under the provisions of 11 O. S. 1941, section 1042, and no irregularity in connection therewith is shown.

Furthermore, it appears that these additions were annexed to the town of Skiatook in 1912, and have constituted a part of the town from that time to the present.

In City of Blackwell v. City of Newkirk, 31 Okla. 328, 121 P. 260, cited with approval in Biggerstaff v. City of Altus, 114 Okla. 98, 243 P. 751, we said:

> "When sufficient facts exist to confer authority and jurisdiction on the city council to annex adjacent territory to the city, and there has been a substantial compliance with the provisions of the statutes relating thereto, the validity of such annexing ordinance cannot be attacked in a collateral proceeding by reason of defects, informalities, or irregularities in its passage."

It follows that this contention of plaintiffs is without substantial merit.

In their next contention plaintiffs assert that the bonds are invalid for the reason that the procedure prescribed in 11 O. S. 1941, sections 1007 and 1008 was not followed. Examination of the record discloses that the proceedings for the issuing of the bonds were in accordance with the provisions of Art. 10, section 27 of the Constitution, and 11 O. S. 1941, sections 61 to 65 inclusive.

In State v. Keith, 179 Okla. 563, 66 P. 2d 1059, we held that Art. 10, section 27 of the Constitution was self executing, and that the power therein conferred could not be restricted or extended by the Legislature, but stated that we did not hold that the Legislature could not provide a specific and convenient method of carrying out the provisions of section 27.

Counsel for plaintiffs assert that sections 1007 and 1008 were enacted for this purpose, but examination of those sections discloses that they were apparently enacted for the purpose of providing an alternate or different method which might be pursued by towns in establishing a system of electric lights. Said sections provide for the levy of a tax to provide the money necessary to establish such electric lighting system, and further provide that in the event the tax is insufficient to raise the necessary amount, then the town may issue its bonds therefor. This provision and the

further provision that the bonds shall not exceed five per cent of the taxable value of the property does not evidence a purpose to carry out the provisions of Art. 10, section 27 of the Constitution, but are inconsistent therewith, 11 O. S. 1941, Sections 61-66 was apparently enacted by the Legislature for the purpose of providing a method or procedure to be followed in order to carry out the grant of power in Art. 10, section 27, and this was the procedure followed by the town of Skiatook. This was in our judgment, sufficient, and the town was not required to comply with the provisions of 11 O. S. 1941, sections 1007-1008.

It is next contended that the initial steps for the issuance of bonds were taken at a special meeting of the town trustees, and that such meeting was not legal for the reason that no call or notice was issued or given as required by 11 O. S. 1941, section 641. The evidence shows that the town had never provided for regular meetings of the town trustees, but that all their business was conducted at special meetings, and that in this case, although no call was issued for the special meeting, all the trustees were present and signed a written waiver of notice of the time and purpose of the meeting. This was sufficient, in our judgment, to make this special meeting legal.

The proposition submitted to the voters of Skiatook reads in part as follows:

"Proposition

"Shall the Town of Skiatook, State of Oklahoma, incur an indebtedness in the sum of Forty-nine Thousand Six Hundred ($49,600.00) Dollars by issuing its negotiable coupon bonds in said sum to provide funds for the purpose of purchasing an electric distribution system and repairing and improving same, or constructing a new electric distribution system, if that be more expedient or desirable, said electric distribution system to be owned exclusively by said town; * * *"

Plaintiffs contend that by this proposition two purposes for the use of the bonds were submitted to the people without designating how much of the money should be used for each purpose. They say the purposes are (1) to pur-

chase or construct the distribution system, or (2) to repair the distribution system. They urge that the failure — specify the amount of money to be used to purchase or construct the system, and the amount to be used for repairs, made the proposition void for uncertainty, citing City of Alva v. Mason, 150 Okla. 25,300 P. 784; Bowen v. Garber, 77 Okla. 16, 185 P. 1095, and State, ex rel. City of Cushing v. King, 162 Okla. 69, 19 P. 2d 138. We are unable to agree with this contention.

The reasonable interpretation of the proposition submitted to the voters of Skiatook was that the bonds were to be used for the purpose of acquiring an electric distribution system in one of two ways, (1) the purchasing, repairing, and improving of an electric distribution system, or (2) in constructing a new electric distribution system if the council found that the construction of a new system was preferable to the purchase and repair of an old one. In either event only such portion of the bond issue as was necessary to effect the purpose was to be used. While the proposition does not so state, it is reasonable to assume that the town proposed to acquire, if possible, the distribution system than being used to service the town, and to improve and repair the same as might be found necessary in order to put it is the best possible condition. This was, we think, contemplated by proposition (1). If the system then serving the town could not be acquired, or if the cost thereof, with the necessary repairs and improvements, was too great, then the trustees were to construct a new distribution system.

These purposes were in the alternative, and the question of the amount of repairs and improvements necessary, if the old plant was acquired, was, we think, discretionary with the trustees, depending upon the amount paid for the old plant, and what repairs or improvements were most necessary to enable the trustees to place the old plant in good working order. In this respect the proposition is somewhat similar to the proposition involved in McDougald v. Incorporated Town of Broken Bow, 71 Okla. 231, 176 P. 959. In that case the proposition submitted to the voters was whether the town should issue its bonds

in the amount of $17,500.00 for the purpose of providing funds for purchasing a site, and constructing a building thereon for a town hall and jail, and furnishing the same. In support of the claim that the proposition was too indefinite and uncertain, it was suggested that the board of trustees might attempt to use only a small part of the proceeds in the erection of a comparatively worthless building, and spend practically the entire fund in furnishing the same. We rejected this contention, saying that we must presume that the funds would be expended in good faith and in a lawful, reasonable and business-like manner for the purposes for which the indebtedness was authorized, and we held that the proposition was sufficiently definite and certain, and sustained the validity of the bonds. Likewise in the instant case we think that the amount to be expended for the acquisition of the system and for repairs and improvements, if one was purchased, was properly left to the judgment of the trustees, and we will presume that they will act in good faith for the best interests of the town. There is nothing in the record to indicate a contrary intention on their part.

The last contention of plaintiffs is that the trial court erred in striking certain allegations from plaintiffs' pleadings, and in refusing to permit plaintiffs to amend their petition to present such issues. By the allegations so stricken plaintiffs alleged that the board of trustees of Skiatook knew that an adequate new distribution system could not be purchased for the sum of $49,600.00 but that it would cost $75,000.00, or more, to construct an adequate new system. They further alleged that the voters had theretofore rejected a proposition to issue bonds in the sum of $75,000.00 for such purpose, and that in truth and in fact it was the intention of the board to obtain approval of the bonds in the sum of $49,000.00, which they knew to be inadequate, and later attempt to secure the approval of an additional bond issue necessary to complete the distribution system. The trial court sustained the motion of defendants to strike these allegations and refused to permit similar allegations by way of amendment.

In their argument on this contention plaintiffs rely upon Borin v. City of Erick, 190 Okla. 519, 125 P. 2d 768. In that case the purpose of the council, as reflected by the statutes of its meetings, was to construct a plant costing $110,000.00 by the use of a bond issue of $60,000.00 and a loan to be obtained from the federal government. Pursuant to this purpose the proposition to issue bonds in the amount of $60,000.00 was submitted to and approved by the voters. After the bonds had been voted the federal government withdrew its contemplated grant of $50,000.00. Notwithstanding this fact the city was proceeding to sell and deliver the bond issue when the plaintiff brought an action to enjoin such sale and delivery. In that case we held that the bond ordinance, and the proposition submitted to the voters did not actually specify the real purpose of the bond issue, since they did not mention the proposed federal grant, when as a matter of official record, the purpose was that the bond issue, together with the sum to be obtained through the federal grant, should be used to erect a $110,000.00 plant.

There is nothing in the record in the instant case which makes it comparable to the situation in the Borin case. In the Borin case we pointed out that in Reid v. City of Muskogee we held that the motives of officials and electors were not proper subjects of judicial inquiry in an action like this, and said that the court there referred to personal motives and not to purposes as expressed by official action.

In the instant case there is no official action by which the motives or purposes of the trustees is in any wise impugned.

In Price v. Storms, 191 Okla. 410, 130 P. 2d 523, we refused to consider evidence of newspaper articles stating that the editor had been assured by representatives of the city council and chamber of commerce that the bonds would not be issued except that the guarantee of the federal government that an army flying school would be located in Okemah if the airport for which the bonds were to be voted was built. In that case we called attention to the fact that the Borin case was based upon the showing of purpose reflected by the minutes and proceedings of the city council,

and that nothing of that kind was reflected in this case. The rule announced in Price *f.* Storms, supra, applies in the instant case, and evidence of what purpose the trustees might have, but had not expressed, could not be used to defeat the bond issue. From the record it appears that the proceedings leading up to the issuance of the bonds had been duly approved by the Attorney General, and that the bonds can be sold and the proceeds used for the purposes stated in the proposal submitted to the voters. We find nothing in the record invalidating or affecting the validity of the bonds, and the objections of the plaintiffs and the intervenor to their validity are, in our judgment wholly untenable.

Affirmed.

MOTION FILED OCT 10 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 349

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Appellant,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, BOARD OF TRUSTEES OF THE TOWN OF SKIATOOK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE STATEMENT OPPOSING JURISDICTION, STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

R. L. DAVIDSON, JR.,
JAMES G. DAVIDSON,
Counsel for Appellees.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER AND PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION,

Appellants,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,

Appellees

MOTION FOR LEAVE TO FILE STATEMENT OPPOSING JURISDICTION OUT OF TIME

Come now the Town of Skiatook, a municipal corporation, the Board of Trustees of the Town of Skiatook, Earl E. Yeargain, J. Milton Patrick, Russell G. Jones, William J. Supernaw, Frank Cochran, and the Exchange Bank of Skiatook, a corporation, and respectfully move the court that they be given and granted leave to file their statement making against the jurisdiction of the Supreme Court of the United States in the above styled appeal and their motion to dismiss or affirm out of time.

In support of said motion it is respectfully shown as follows:

(1) That appellants served upon counsel for appellees their petition for the allowance of an appeal, assignment

of errors, order allowing appeal, statement of jurisdictional grounds, praecipe for transcript of record and citation on the 24th day of August, 1950.

(2) That appellants failed and neglected to comply with the rules of the Supreme Court of the United States, Rule 12, Paragraph 2(b), by failing and neglecting to serve upon appellees or any one of them or their counsel a statement directing attention to the provisions of Paragraph 3 of Rule 12 as required by said Paragraph 2 of Rule 12.

(3) That thereafter and on the 26th day of September, 1950, appellants served counsel for appellees with statement calling attention to Paragraph 3 of Rule 12 of the United States Supreme Court Rules as required by the provisions of Rule 12, Paragraph 2(b); that by reason of appellants failure to comply with the provisions of Rule 12, Paragraph 2(b), appellees were not apprized in sufficient time to file with the Clerk of the Court possessing the record their statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of the United States within the time allowed by Paragraph 3 of Rule 12.

(4) That equity and justice require that appellees be given an opportunity to file their statement making against the jurisdiction and that the rights of appellants will not be prejudiced by the allowance and granting of this motion.

The statement making against the jurisdiction of the Supreme Court of the United States, together with a motion to dismiss or affirm, are hereto attached to be filed in this cause upon the granting of leave as herein requested.

Respectfully submitted,

R. L. Davidson, Jr.,
James G. Davidson,
Attorneys for Appellees.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER AND PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION,

Appellants,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,

Appellees

STATEMENT OPPOSING JURISDICTION

Come now the appellees with leave of court having been first obtained and file this their statement of matter and grounds making against the jurisdiction of the Supreme Court of the United States as asserted by the appellants.

It is the contention of appellees that the Supreme Court of the United States is without jurisdiction of this purported appeal for the following reasons, to-wit:

(1) The decision of the Supreme Court of the State of Oklahoma herein complained of does not draw in question the validity of any statute of the State of Oklahoma on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The record discloses that appellants have not at any stage of the proceedings attacked the validity of Title 11, OS Annotated, Sections 482 and 1042, and are raising the question of the validity of said

Sections of the Statutes of the State of Oklahoma for the first time on this attempted appeal. The mere objection to an exercise of authority granted by a statute whose validity is not attacked cannot be made the basis for review by appeal.

Cases relied upon by appellees as making against the jurisdiction are:

Jett Bros. Distilling Co. v. *Carrollton,* 252 U. S. 1, 64 L. Ed. 421;

Zucht v. *King,* 260 U. S. 174, 67 L. Ed. 194.

(2) The record discloses that no substantial federal question is presented for review for the following reasons:

(a) The Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, pp. 267-278, Section 21, provides that the Osage Indian Reservation should be erected into a single county and that the boundaries of the county should not be changed until the lands of the Osage Indian Reservation had been allotted in severalty and until such boundaries should be changed by the Legislature of Oklahoma. The Statutes of the State of Oklahoma, to-wit, 11 O. S. 1941, Sections 482 and 1042, which sections appellants contend are repugnant to the Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21, prescribe the method and manner and give the authority to municipal corporations in the State of Oklahoma to change, alter and expand their corporate limits. It is apparent that the boundary of a county is not synonymous and does not include the corporate limits of a city or town. The text of the pertinent portion of the Act of Congress, June 16, 1906, 34 Statutes at Large, pp. 267-278, Section 21; Section 482 of Title 11 O. S. 1941; and Section 1042 of Title 11 O. S. 1941, are appended hereto and marked Exhibits "A", "B" and "C", respectively. The provisions of the Statutes of the State of Oklahoma relating to the alteration and changing of county boundaries are contained in Title 19 O. S. 1941, Section 11,

etc., the provisions of Section 11 being appended hereto and marked Exhibit "D". The federal question attempted to be raised herein by appellants is frivolous and devoid of merit for the reason that it is based upon obviously false assumption, to-wit: That a change in city or town boundaries is the same equivalent to or tantamount to a change in county boundaries. The cases relied upon by appellees making against jurisdiction for the above grounds are: *Southern Pacific Co.* v. *Arizona,* 249 U. S. 472, 63 L. Ed. 713. *Parker* v. *McLain,* 237 U. S. 469, 59 L. Ed. 1051. (b) The question of the validity of the annexation of territory located in Osage County to the Town of Skiatook originally incorporated wholly within Tulsa County, Oklahoma, was raised by appellants in the trial of said cause by Sub-paragraph 5 of Paragraph VIII of plaintiffs' petition appearing at page 15 of the transcript now being prepared for this appeal. The only material allegation there made relates to the qualification of electors who were permitted to vote upon the proposition of issuing the bonds of the Town of Skiatook, and since the qualification of electors in municipal elections is a purely State question, the determination by the Supreme Court of the State of Oklahoma in the decision now being appealed from to the effect that said annexations of territory in Osage County were valid annexations and, therefore, the persons residing in Ward 3 of the Town of Skiatook, said Ward being located wholly within Osage County, were properly entitled to vote at the election authorizing the issuance of said bonds is not a decision involving a substantial federal question.

Kammerer v. *Kroeger,* 299 U. S. 302, 81 L. Ed. 253.

(3) The Supreme Court of the State of Oklahoma in its decision of May 23, 1950, decided said Cause No. 34,166 upon a non-federal ground which is in itself broad enough to sustain the judgment even though it should be determined that there is also involved an independent federal

question in the case. The Supreme Court of Oklahoma held that the annexing ordinances attacked by the appellants (plaintiffs below) could not be attacked in a collateral proceeding. As stated by the trial judge (page 53 of the transcript being prepared for this appeal), "The proceedings were under color of law and there was no legal impediment to the annexation. Consequently, the Town has at least a de facto existence and its existence cannot now be collaterally attacked." The cases relied upon by appellees are: *United States* v. *Hasting,* 296 U. S. 188, 80 L. Ed. 148; *Utley* v. *The City of St. Petersburg, Florida,* 292 U. S. 106, 78 L. Ed. 1155.

(4) The record in this appeal is devoid of any proof that the lands of the Osage Indian Reservation have not been allotted in severalty within the meaning of Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21. The appellants did not introduce any testimony or evidence disclosing or tending to disclose the status of the lands of the Osage Indian Reservation. It was incumbent upon the plaintiffs below to sustain by proper proof all the necessary facts to prove the allegations of their petition. The Supreme Court of the United States will not indulge in conjecture, implication or inference to read a federal question into a cause where it does not appear from the record that such a question was involved. It must stand conceded that, if in truth and in fact the lands of the Osage Indian Tribe have been allotted in severalty, the inhibitions contained in the Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21, relating to the changing of the boundaries of Osage County would constitute no further impediment to such a change. The appellants (intervening plaintiff below) in failing to introduce any evidence as to the status of the Osage Indian Tribal lands failed to sustain the burden of proof and cannot now seek appeal to this

court where it would be necessary for the court to go outside of the record to establish the facts necessary to raise a federal question, if any there be.

The decisions relied upon by appellees on the proposition stated in this section are: *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154; *Lynch* v. *People of New York, ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191.

R. L. Davidson, Jr.,
James G. Davidson,
Attorneys for Appellees.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER AND PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION,

Appellants,

VS.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,

Appellees

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Come now the appellees above named and respectfully move to dismiss the appeal herein on the ground:

(1) That the case presents no appealable decision of the Supreme Court of the State of Oklahoma, but the right of review, if any there be, is properly by writ of certiorari.

(2) The case presents no substantial federal question.

(3) The decision of the Supreme Court of Oklahoma is supported by the determination of an independent question non-federal in character even if there be an independent federal question in said case.

(4) The record fails to disclose the necessary jurisdictional characteristics necessary for appeal.

And they further move, in the alternative, that, if the motion to dismiss is not granted, that honorable court affirm the decision of the Supreme Court of the State of Oklahoma on the ground that the questions on which the decision of this cause depends are so frivolous and unsubstantial as to need no further argument, all as appears in the statement of grounds making against the jurisdiction of the Supreme Court of the United States filed herewith.

R. L. Davidson, Jr.,
James G. Davidson,
Attorneys for Appellees.

EXHIBIT "A"

Act of Congress, June 16, 1906, Public Law 234, 34 US Statutes at Large, pp. 267-286, Section 21, p. 277

"Sec. 21 That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof, and shall provide rules and regulations and define the manner of conducting the first election for officers in said county. * * *"

EXHIBIT "B"

TITLE 11, O. S. 1941, § 482.

Annexation On Petition Of Three-Fourths of Voters And Property Owners—On petition in writing signed by not less than three-fourths of the legal voters and by the owners of not less then three-fourths of the (in value) of the peoperty in any territory contiguous to any incorporated city or town and not embraced within the limits thereof, the City Council of the city or the board of trustees of the town, as the case may be, shall by ordinance annex such territory to such city or town upon filing a copy of such ordinance with an accurate map of the territory annexed (duly certified by the mayor of the city or the president of the board of trustees of the town), in the office of the register of deeds of the county where the annexed territory or the greater portion of it is situated, and having the same recorded therein. R. L. 1910, § 501.

EXHIBIT "C"

TITLE 11, O. S. 1941, § 1042

Addition Of Adjoining Plat—Whenever there shall be lots laid off and platted adjoining such town, and a record of the same is made in the register of deeds' office of the proper county, the trustees may by a resolution of their board extend the boundary of such town so as to include such lots; and the lots so annexed shall thereafter form a part of such town and be within the jurisdiction thereof. The trustees shall immediately thereafter file a copy of such resolution, together with the plat and map of survey defining the boundaries of such addition, in the office of the register aforesaid. R. L. 1910, § 718.

EXHIBIT "D"

TITLE 19, O. S. 1941, § 11

Vote by People—Taxable Property—Area—Population—Before any new counties shall be established, or any county lines in this state shall be altered or changed, such question shall first be submitted to a vote of the qualified electors residing in the territory to be formed into such new county or transferred to another county, and shall be approved by the sixty per centum of the votes cast in each particular territory sought to be taken from an existing county in said election; provided, no new county shall be formed of less than four hundred square miles taxable area, nor with a population of less then fifteen thousand people, nor with taxable wealth less than two and one-half million dollars, as shown by the current tax rolls. Nor shall any territory be taken from an existing county for any purpose bringing the newly created lines of such existing county nearer than ten miles to the county seat thereof. Nor shall the taxable area, population or taxable wealth of said existing county be reduced below that required for a new county. Nor shall any territory, in any

case, be transferred from one county to an existing county, if, by such transfer of territory, the county from which the territory to be taken will then be smaller in area than the county to which the addition is made; provided, that when the territory is to be transferred from one existing county to either a new or an existing county, there must be sixty per centum of the vote cast in such particular territory in favor of the transfer, and, in case the transfer to be to an existing county, the acceptance of such territory must first be approved by a majority vote of the electors of said county; provided, that any such election shall be governed by the general election laws, when same are not in conflict herewith. Laws 1910-11, ch. 40, p. 72, § 1.

No. 349. PUBLIC SERVICE COMPANY OF OKLAHOMA *v.* TOWN OF SKIATOOK ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion for leave to file motion to dismiss or affirm is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harry D. Moreland* for appellant. *John H. Poe* for appellee. Reported below: 203 Okla. 316, 220 P. 2d 273.